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No. 629.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE UNITED STATES OF AMERICA,
Appellant,

v.

PHILIP LEPOWITCH and MARVIN SPECTOR,
Appellees.

On Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

BRIEF FOR APPELLEES.

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OPINION BELOW.

The opinion of the District Court (R. 4-6) sustaining the joint demurrer to both counts of the indictment, is not reported.

JURISDICTION.

The jurisdiction of this Court on direct appeal from the judgment of the District Court sustaining the joint demurrer to the indictment, is invoked under the Act of

March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, Pub. No. 543, 77th Cong. 2nd sess., c. 295 (18 U. S. C. 682), commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). The order of the District Court sustaining the joint demurrer to both counts of the indictment was entered on October 26, 1942 (R. 6). The order allowing the appeal was entered on November 25, 1942 (R. 8).

QUESTION PRESENTED.

The single question presented is whether the allegations charged in count one of the indictment constitute an offense under Section 32 of the Criminal Code (18 U. S. C. 76).

STATUTE INVOLVED.

The statute involved is the act of April 18, 1884, c. 26, 23 Stat. 11, as amended by the Act of March 4, 1909, c. 321, Section 32, 35 Stat. 1095, and the Act of February 28, 1938, c. 37, 52 Stat. 83 (18 U. S. C. 76). The statute reads as follows:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, or under the authority of any corporation owned or controlled by the United States, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

STATEMENT.

This is a direct appeal by the United States from the judgment of the District Court for the Eastern District of Missouri, Eastern Division, sustaining a joint demurrer of the defendants to both counts of a two-count indictment. The first count of the indictment sought to charge a violation of the first clause of Section 32 of the Criminal Code (18 U. S. C. 76), and the second count sought to charge a violation of the second clause of that statute. The appellant, however, has now voluntarily abandoned its objection to the ruling of the District Court in sustaining the joint demurrer as to the second count of the indictment,[1] and same is not now before this Court on this appeal.[2]

The material part[3] of count one of the indictment, charges that on September 1, 1942, the defendants

> "* * * with intent to defraud one, Mrs. Adele Silk, did * * * pretend to be * * * agents of the Federal Bureau of Investigation, and did * * * take upon themselves to act as such by * * * demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman. * * *" (R. 1, 2).

The material part[3] of count one of the indictment, charges that on September 1, 1942, the defendants

> "* * * with intent to defraud one Mrs. Adele Silk, did * * * pretend to be * * * agents of the Federal Bureau of Investigation, and * * * did demand from

[1] In the appendix "1", pages 5, 6 of Appellant's Brief, we find the following: "Although we do not concede that the district court did not err in its decision with respect to the second count we do not now rely on any error therein. For purposes of this case we acquiesce in the decision of the district court insofar as it results in a dismissal of the second count of the indictment."

[2] See Southeastern Express Co. v. Miller, 264 U. S. 541, 542.

[3] We elliptify the indictment for the sake of clarity, since we admit that the false impersonation is adequately charged.

> the said Mrs. Adele Silk a valuable thing, to wit: demand that she the said Mrs. Adele Silk then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman * * *" (R. 2, 3).

The factual case was, though the record does not disclose same, that the defendants were employes of a local credit clothing company, and that Abe Zaidman had previously purchased some clothing from the defendants' employer on the installment plan. Thereafter he became delinquent in his account, and defendant Lepowitch telephoned Mrs. Adele Silk to ascertain the whereabouts of Abe Zaidman in order to contact him and request him to make a payment on his said account. In the course of the telephone conversation, defendant Lepowitch, at the suggestion of defendant Spector, told Mrs. Silk that he was an agent of the Federal Bureau of Investigation. It would seem from the language of the second count of the indictment, that the defendants merely "demanded" but did not actually obtain the information sought by them, from Mrs. Silk. We make this statement dehors the record apologetically, for though it is of no effect on this appeal,[4] we felt it would be helpful to the Court to know the transaction which led to the indictment.

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[4] Maryland Casualty Co. v. Jones, 279 U. S. 792, 796.

SUMMARY OF ARGUMENT.

1. The "intent to defraud" is an essential element of the offense.

2. The words "intent to defraud" as used in this statute, mean the intention of depriving another of money or property by falsely posing as a Federal officer.

3. The oral information sought from Mrs. Silk, as to the whereabouts of Abe Zaidman, is neither money nor property, and consequently is not subject to defraudment.

4. The overt act required by the statute relates to the "intent to defraud," and must be an act committed in pursuance thereof and sufficiently associated thereto, as to convert the fraudulent intent into a fraudulent attempt.

5. The indictment charging an overt act must recite the facts comprising the overt act.

6. Indictments charging fraudulent conduct must recite the facts that comprise the fraudulent conduct, and general allegations are insufficient.

7. The allegation charging the overt act serves two purposes in the indictment, (1) a recital of the facts comprising the overt act, and, (2) a description of that which Mrs. Silk was sought to be defrauded. Since information as to the whereabouts of a third person is not property, nor a subject of property, it is not a subject of defraudment. The indictment, therefore, affirmatively negatives an intent to defraud, and does not state an offense.

ARGUMENT.

Appellant has raised three points in its brief on this appeal, which we summarize herein for the sake of clarifying the issues. Appellant's position seems to be:

1. That if the indictment had merely charged that the defendants took upon themselves to act as the impersonated officers, without describing what act they performed in their pretended capacity, it would be a valid and sufficient indictment; and, therefore,

(a) the words

> "by then and there in said pretended capacity, demanding of and from the said Mrs. Adele Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman,"

which describes the overt act, is mere surplusage and should be disregarded, and, when so disregarded, the indictment is valid and sufficient.

2. That the said overt act clearly related to the usual duties of the officers impersonated, and that, therefore, said act was in keeping with the pretense.

3. That the phrase "with intent to defraud" appearing in the first clause of the statute, ought not to be given its usual and ordinary meaning, i. e., with the intention of depriving another of property by deceitful means, but that the import of the phrase "with intent to defraud" is merged in and is fully satisfied by the deceit inherent in the false impersonation; because,

(a) The main purpose and aim of the statute is to protect the good repute and dignity of the Federal service by prohibiting false impersonations thereof.

In the interests of perspicuity, we shall not treat appellant's points in the sequence in which they appear above.

We prefer instead to thoroughly analyze the statute, and the indictment with respect to the statute, and in that fashion fully answer appellant's contentions, and moreover, demonstrate that the indictment does not charge an offense under the statute.

I.

The "Intent to Defraud" Is an Essential Element of the Offense.

(a) The legislative history of the statute.

The statute in question[5] was submitted in the House of Representatives, by Representative Browne of Indiana, who stated the object of the bill[6] as follows:[7]

> "The bill provides a penalty against certain banditti that are now prowling over the country and levying blackmail on pension claimants."

No other record comment was made in the House on this bill. In the Senate, the only comment made on the bill was by Senator Garland, who, as Chairman of the Senate Committee on Judiciary, in reporting the bill back to the Senate, stated:[8]

> "* * *. As the bill is one of importance and is being pressed by the Pension Office particularly, I ask for its present consideration."

The bill, which was approved on April 18, 1884, bore the following preamble or title:[9]

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[5] Sec. 32 of the Criminal Code (18 U. S. C. 76).

[6] H. R. 4993, 48th Cong. 1st sess., 15 Cong. Rec. 1156.

[7] 15 Cong. Rec. 2256, 48th Cong., 1st sess.

[8] 15 Cong. Rec. 2627, 48th Cong., 1st sess. The omitted part of Sen. Garland's remarks related to the reporting of the bill back to the Senate, with the amendment of the insertion of the words "or any officer" after the word "Department" in the two places where same appeared in the bill.

[9] 15 Cong. Rec. 3368, 48th Cong., 1st sess.

> "An act making it a felony for a person to falsely and fraudulently assume or pretend to be an officer or employe acting under authority of the United States, or any department or any officer thereof, and prescribing a penalty therefor."

It is particularly significant that the preamble or title of the bill[10] requires that the impersonation be both "falsely and fraudulently." It is also particularly significant that Rep. Browne, the sponsor and legislative member in charge of the bill[11] described it as operating on "certain banditti" who are "levying blackmail." It is no coincidence that the title of the bill, the remarks of its sponsor explaining its objective, and the very words of the statute[12] specifically and affirmatively contemplate the existence of an "intent to defraud" as an element of the offense.

In the second session of the 47th Congress, (Saturday, February 24th., 1883), Senator Allison offered an amendment to the appropriation bill, making it a misdemeanor for a person to, falsely impersonate an officer or employe of the Pension Office, and act as such.[13] This amendment was forthwith withdrawn upon the objection of Senator Edmunds who said:[14]

> "Some law of this kind undoubtedly ought to be passed; * * *. Now, there ought to be a law punish-

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10 The preamble or title of an act may be considered in ascertaining the legislative intent. Coosaw Min. Co. v. So. Carolina, 144 U. S. 550, 563; Church of the Holy Trinity v. United States, 143 U. S. 457, 462.

11 The statements made on the floor of Congress by the legislative member in charge of the bill may be considered in ascertaining its meaning and intent: United States v. Great Northern R. Co., 287 U. S. 144, 154; Wright v. Mountain Trust Bank, 300 U. S. 440, 463.

12 "Whoever, with intent to defraud * * *"

13 (14 Cong. Rec. 3238.) This proposal did not contemplate the requirement of an intent to defraud.

14 (14 Cong. Rec. 3238.) The omitted part of Senator Edmunds' remarks related to generalizing a proper bill to cover the entire Federal service, and not limited to the Pension Office.

ing every person who falsely personates any officer or employe of the United States for the purpose of committing any wrong or fraud upon anybody; that is plain enough; * * * it can pass by unanimous consent in two minutes, I have no doubt."

Later that same day, Senator Blair submitted a bill[15] in the identical language of Senator Allison's proposal. On the Monday following (February 26th, 1883), Senator Garland submitted, on behalf of the Judiciary Committee of which he was a member, a bill[16] which was forthwith considered by the Senate as a Committee of the Whole, and forthwith passed unanimously.[17] Senator Blair's bill (S. 2506) died in the Judiciary Committee. Congress adjourned sine die before Senator Garland's bill (S. 2507) could reach the House.[18] The bill that Rep. Browne submitted in the House (H. R. 4993) in the next session of Congress (48th Session, 1st session), and which passed both Houses of Congress and became Section 32 of the Criminal Code (18 U. S. C. 76), was in the identical words of the bill submitted by Senator Garland (S. 2507, 47th Cong. 2nd sess.), which served as a substitute measure in place of Senator Blair's bill (S. 2506, 47th Cong. 2nd sess.).

15 S. 2506, 47th Cong., 2nd sess., 14 Cong. Rec. 3239, which reads as follows: "Any person who falsely represents himself to be an officer, agent, or employe of the Pension Bureau of the Interior Department, or in such assumed character pretends or assumes to act and perform or does perform in such assumed character any duty or act belonging to such officer, agent, or employe so falsely personated, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding $1,000, or be imprisoned for a period not more than two years, or both, in the discretion of the court."

16 S. 2507, 47th Cong., 2nd sess., 14 Cong. Rec. 3263, which reads as follows: "Any person, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employe acting under the authority of the United States, or any department of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

17 14 Cong. Rec. 3263, 4.

18 15 Cong. Rec. 1285.

It is noted that the bills proposed by Senators Allison and Blair, which were short-lived, did not include the element of intent to defraud, and that Senator Garland's bill (S. 2507, 47th Cong. 2nd sess.), and Rep. Browne's bill (H. R. 4993, 48th Cong. 1st sess.) which were enacted into law, specifically included the element of intent to defraud.

By the rules of simple reasoning we conclude that Senator Allison's proposal and Senator Blair's bill making it a misdemeanor for a person to falsely impersonate a federal officer and act as such[19] was considered by Congress and that later Congress selected instead the bill making it a felony for one to falsely impersonate and act as a federal officer with the intent to defraud the United States or any person.[20] It is a rule of construction, recognized and announced by this Court, that where Congress in enacting a law acts specifically only on one of two recommended bills, it indicates that the language of the bill acted upon and enacted into law was preferred by Congress, and the words thereof must be taken at their face value. See Helvering v. Wood, 309 U. S. 344, 348. In enacting the later bill it is clear that Congress purposely added the element of intent to defraud, made the offense a felony instead of a misdemeanor, and increased the maximum punishment from two years to three years in the penitentiary.

As recent as Pierce v. United States, 314 U. S. 306, this Court, in discussing the legislative history of this statute, said (l. c. 307):

> "The section has been upon the statute books since April 18, 1884. 23 Stat. at L. 11, chap. 26. It was passed because of reports to Congress by the Pension Office of **fraudulent practices** affecting pension claimants." (Emphasis added.)

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[19] 14 Cong. Rec. 3238, 9, 47th Cong., 2nd sess.

[20] H. R. 4993, 48th Cong., 1st sess., now Sec. 32 of the Criminal Code (18 U. S. C. 76).

I.

"Intent to Defraud" Is an Essential Element of the Offense.

(b) An analysis of the statute, with reference to the "intent to defraud."

It will be noted that the element of "intent to defraud" received prominent recognition both in the legislative history and in the express language of the statute. The statute in question (Sec. 32 of the Criminal Code, 18 U. S. C. 76) embodies two distinct offenses, and the first count of the indictment sought to charge defendants with the offense prescribed in the first clause thereof. The elements of such offense[21] as are material to the case at bar are:

1. with intent to defraud a person.[22]
2. falsely pretend to be a Federal officer, and,
3. act as such, i. e., commit an overt act.

To constitute a violation thereof there must be the concurrence of all three elements, i. e., the intent to defraud a person, the false impersonation, and the commission of an overt act. It will be readily seen that neither the false impersonation with the intent to defraud, absent the overt act, nor the false impersonation and the overt act, absent the intent to defraud, is sufficient to constitute a violation of the statute. All three elements find their source in the very words of the statute, and are of essence to the commission of the offense, and the failure or absence of any

[21] In United States v. Barnow, 239 U. S. 74, 78, the statute is summarized as follows:

> "Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States or any department or officer of the government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character * * *"

[22] The statute denounces the false impersonation if made "with intent to defraud either the United States or any person." In the case at bar, the indictment charges an intent to defraud Mrs. Silk, a person, and not the United States.

one element is a fatal defect (Baas et al. v. United States, 25 Fed. [2d] 294, 295 [C. C. A. 5]).

If it should be said that the words "intent to defraud" in the statute are mere surplusage,[23] we ask then, Didn't Congress make the offense a felony instead of a misdemeanor, and increase the punishment because the inclusion of the element of intent to defraud made it a more heinous offense than mere false impersonation? We cannot ascribe a senseless purpose to Congress, but rather, as this Court said in Montclair v. Ramsdell, 107 U. S. 147, 152:

> "It is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed."

See also, Ginsberg & Sons v. Popkin, 285 U. S. 204, 208, where it is said:

> "if possible, effect shall be given to every clause and part of a statute."

Particularly apropos is the principle announced by this Court in Stephens v. Cherokee Nations, 174 U. S. 445, 480, that words in a statute cannot be rejected as redundant or surplusage where they can be given full effect, nor can it be assumed that they tend to defeat the real object of the enactment, but rather that they are in effectuation of the real object thereof. In the case at bar the statute expressly includes the words, "with intent to defraud" and a comparison of the language, purpose and structure of this statute with that of the false pretense statutes of the various states will demonstrate that this statute was patterned therefrom and was enacted to serve, as indeed it does serve, as the Federal false pretense statute. Its only dif-

[23] "But the admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words." Strong, J., in Platt v. Union P. R. Co., 99 U. S. 48, 58.

ference therefrom is that the Federal statute limits the false pretense to false impersonation of a federal officer (for constitutional reasons) while the state statutes denounce any false pretense; also, the state statutes declare the completed defraudment[24] to be a felony, and the incompleted defraudment[25] a misdemeanor, whereas the Federal statute expressly declares both the completed defraudment[26] and the incompleted defraudment[27] as felonies and violative of the statute.

Applying the rule that a statute patterned after the statute of another state, is presumed to take with it the meaning it had in such state (Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 130; Brown v. Walker, 161 U. S. 591, 600), a review of the decisions of the courts of the various states will conclusively demonstrate that where the false pretense statute requires an act to be done "with intent to defraud" that such intent is a necessary element, and means doing an act with the purpose and intention of depriving another of property, by false pretenses.

A reading of the cases of Pierce v. United States, 314 U. S. 306; United States v. Barnow, 239 U. S. 74; and, Lamar v. United States, 241 U. S. 103, establish beyond a peradventure of a doubt, that the statute affirmatively contemplates the existence of the element of "intent to defraud," to be violative thereof.

It is a cardinal rule of construction that a penal statute will not be so construed as to destroy the effect of a

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[24] The actual obtaining of property by false pretenses.

[25] The doing of an overt act, with the intent to deprive another of property by false pretense, but which act falls short of actually obtaining the property.

[26] "* * * obtain from any person * * * any money, paper, document or other valuable thing * * *" (Sec. 32 of Criminal Code [18 U. S. C. 76], second clause thereof).

[27] The overt act done with the intent to defraud a person, i. e., to deprive another of property, by the false impersonation, which act falls short of actual accomplishment (Sec. 32 of the Criminal Code [18 U. S. C. 76], first clause thereof), or, "* * * demand * * * from any person * * * any money, paper, document, or other valuable thing * * *" (Sec. 32 of the Criminal Code [18 U. S. C. 76], second clause thereof).

kindred statute; but that such construction will be given to both as will reconcile and render both effective, as parts of one harmonious and synchronous scheme of penal legislation (United States v. Borden Co., 308 U. S. 188, 198; Bird v. United States, 187 U. S. 118, 124; Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 409; Beals v. Hale, 4 How. 37, 51). Kindred to the statute involved in the case at bar, is the Act of Nov. 21, 1921, c. 134, Sec. 6, 42 Stat. 224, 18 U. S. C. 77, now Title 18 U. S. Code, Sec. 77a, which makes it an offense for a person to

1. falsely impersonate a federal officer, and
2. arrest a person or search a person or building.

The element of "intent to defraud" is absent from this latter statute. The two statutes together comprise the scheme of federal legislation on the subject of false impersonation of the general federal service.[28] The one (first clause, 18 U. S. C. 76)[29] makes it a felony to falsely impersonate with intent to defraud, and commit an overt act, the other (18 U. S. C. 77a) makes it a misdemeanor to falsely impersonate (without an intent to defraud) and commit a specified overt act. By giving such statutes the foregoing meanings, respectively, we can harmoniously give full effect to both. But, if we construe away or judicially delete the "intent to defraud" as an essential element in Title 18 U. S. Code, Sec. 76, an absurdity results in this, that Title 18 U. S. Code, Sec. 77a becomes a useless statute, for every violation of Title 18 U. S. Code, Sec. 77a would necessarily be a violation of Title 18 U. S. Code, 76 and could be prosecuted thereunder as a felony. Let us observe how this comes about. By construing away or judicially deleting the "intent to defraud"

[28] Title 18, U. S. Code, Sec. 123, relates to false impersonation of Revenue officers only.

[29] We analyze the first clause of the statute only, because the only indictment (count one) on this appeal is admittedly based on the offense designated in the first clause of the statute.

as an essential element in Title 18 U. S. Code, Sec. 76, it is violated by:

1. False impersonation of a Federal Officer, and
2. Act as such, i. e., commit an overt act.

Title 18 U. S. Code, Sec. 77a, is violated by:

1. False impersonation of a Federal Officer, and
2. Act as such, i. e., commit an overt act,

(a) by arresting a person (depriving him of his constitutional right of liberty, U. S. Const. Amend. V), or

(b) searching a person or a building (depriving him of his constitutional right of freedom from unreasonable search, U. S. Const. Amend IV).

Since Title 18 U. S. Code Sec. 76, would be satisfied by any overt act in keeping with the pretense, it would be satisfied, a fortiori, where the overt act consisted in arresting a person or searching a person or building. Hence, every violation of Title 18 U. S. Code Sec. 77a, would necessarily be a violation of Title 18, U. S. Code Sec. 76, and we would have the absurd situation of two statutes covering the same offense, one a felony and the other a misdemeanor. The absurdity borders on the ridiculous when we consider that any overt act, such as asking a lady for information as to the whereabouts of a third person, is a felony with three years imprisonment, whereas the overt act of arresting a person or searching a person or building (expressly forbidden by the United States Constitution) is a misdemeanor with only one year imprisonment.[30] But

[30] A like comparative analysis of the operative effect of Title 18, U. S. Code, Sec. 123, which provides for two years imprisonment for falsely impersonating a Revenue Officer and demanding or receiving money or a valuable thing, i. e., property, in such assumed character, with that of the first clause of Title 18, U. S. Code, Sec. 76, will result in a similar absurdity. It will be noted, too, that although Title 18, U. S. Code, Sec. 123, does not specifically use the words "with intent to defraud," yet, the

Congress did not intend to enact useless legislation, and, by construing Title 18 U. S. Code Sec. 76, in keeping with its express language, to include "intent to defraud" as an essential element of the offense, we can then harmoniously give effect to both statutes, and relegate each to their respective niche in the general program of Federal penal legislation.

If it be said that the gist, the gravamen, the aim, the purpose and reason of the statute was to maintain the good repute and dignity of the Federal service by condemning the false impersonation of Federal authority,[31] and, therefore, (1) every false impersonation comes within the reason of the statute, regardless of the purpose or intent of the impersonator; and (2) every case that comes within the reason of the statute comes within the statute itself, and (3) that the "intent to defraud" is not, therefore, a necessary element of the offense, and may be disregarded in cases where it is absent; our answer is that the statute expressly requires that in addition to the false impersonation there must also be the "intent to defraud," and that the false pose must be for the purpose and with the intent to defraud.

We are not here concerned with the wisdom of the statute, for the right and power to legislate wisely as well as unwisely resides exclusively in Congress, and its only limitations are the boundaries of the Constitution. And the fact that a case may fall within the reason of the statute, or the evil sought to be suppressed thereby, does not justify the Court to embrace acts which are not within

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requisite acts enumerated in the statute contain all the elements of the "intent to defraud."

To the same effect is the second clause of Title 18, U. S. Code, Sec. 76. The second clause of this statute was leveled at the false impersonator who, with the intent to defraud, demanded or obtained money or property and the first clause of the statute was aimed at the shrewd and cunning false impersonator who, with the intent to defraud a person of money or property, did not resort to bold demands, but operated with finesse. The statute was designed to catch the extortioner as well as the swindler.

31 United States v. Barnow, 239 U. S. 74, 78.

the language of the statute, even though they may involve the same mischief which the statute was designed to suppress. See United States v. Chase, 135 U. S. 255, 261; United States v. Wiltberger, 5 Wheat. 76, 96; Sarlls v. United States, 152 U. S. 570, 575.

In addressing itself to this very question, this Court, in the case of Sarlls v. United States, 152 U. S. 570, 575, said:

> "Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice Marshall when, in the case of United States v. Wiltberger, 5 Wheat. 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated.'"

And to like effect are the cases of Denn v. Reid, 10 Pet. 524, 527,[32] and County of Schuyler v. Thomas, 98 U. S. 169, 172.[33]

In United States v. Weitzel, 246 U. S. 533, the argument was made that inasmuch as the offender came within the reason of the statute he should be considered as coming

[32] "But it is not for the court to say, where the language of the statute is clear, that it shall be construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

[33] "These statutes are to be construed as they were intended to be understood when they were passed, twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation."

within the letter of the statute. This Court, l. c. 542, 543, said:

> "The argument is not persuasive. * * * Furthermore a casus omissus is not unusual, particularly in legislation introducing a new system. * * * Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive."

II.

The Words "Intent to Defraud," as Used in This Statute, Mean the Intention of Depriving Another of Money or Property by Falsely Posing as a Federal Officer.

There are no common law Federal crimes; all Federal crimes must have their basis in some specific Federal statute. As was succinctly said in United States v. Gradwell, 243 U. S. 476, 485:

> "before a man can be punished as a criminal under the Federal law, his case must be 'plainly and unmistakenly' within the provisions of some statute."

However reprehensible,[34] wrongful or immoral the conduct,[35] if not a violation of a Federal penal statute, it cannot be treated as a crime. And mere expediency, exigency or emergency (Ex parte Milligan, 4 Wall. 2, 121) does not make criminal, that which is not made so by Act of Congress. This fundamental principle of law is the bulwark of a free people against the temptation or inclination of a Government to diminish their rights.

Under our system of government the power of legislation is vested exclusively in Congress, and the duty of

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[34] "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground." Peckham, J., in France v. United States, 164 U. S. 676, 682.

[35] "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms." Brewer, J., in Todd v. United States, 158 U. S. 278, 282.

interpreting the law resides in the Judiciary. So recent as Pierce v. United States, 314 U. S. 306, this Court, in reversing a conviction under Section 32 of the Criminal Code (18 U. S. C. 76), refused to judicially enlarge the statute by interpretation to include the impersonation of an officer of the T. V. A.[36] (a Government owned and controlled corporation) on the ground that to do so would be an encroachment upon the legislative powers and functions of Congress.

The statute in question used the general words, "with intent to defraud," without defining or otherwise explaining its meaning. To ascertain the meaning intended by the Legislature in such instances, we are relegated to the rules of construction of statutes. Where Congress used general words in a penal statute, such words are to be given their common-law definition (Swearingen v. United States, 161 U. S. 446, 451), and are deemed to have been used in their common-law sense (McCool v. Smith, 1 Black. 459, 469), because our system of jurisprudence is derived therefrom (United States v. Sanges, 144 U. S. 310, 311). Speaking to this very question, Mr. Chief Justice Fuller, in Pettibone v. United States, 148 U. S. 197, 203, said:

> "The courts of the United States * * * resort to the common law for the definition of terms by which offenses are designated."

The word "defraud" is a legal word, has a technical meaning, and is a product of the common law (Curley v. United States, 130 F. 1, 6, 7 [cert. den. 195 U. S. 628]). "Fraud" and its counterpart "defraud" were the original fountain-heads of equity jurisprudence, and the causative factors in the creation and establishment of the Court of Chancery in England. When the Mayflower disembarked

[36] The offense was committed prior to the amendment of Feb. 28, 1938, c. 37, 52 Stat. 83.

its cargo of common law and its shipload of nation builders on the rockbound shores of New England, the law of "defraud" and its meaning and definition became a constituent part of the law of this country.

The word "defraud" is an etymological combination of the words "de" and "fraud." Webster's New Int'l Dict., 2nd Ed., Unab., defines the word "de" as meaning "from; of; out of," and "fraud," as:

> "LAW. An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing, belonging to him, or to surrender a legal right."

The word "defraud" is defined by the same authority, as:

> "To deprive of some right, interest or property, by deceit; to cheat."

The word "cheat" is therein defined as:

> "LAW. The obtaining of property from another by an intentional active distortion of the truth."

Since "intent to defraud" is itself a compound consisting of two sub-elements, (1) the intention to deprive another of property, and, (2) the deceit, it is vitally essential that both sub-elements co-exist, and the absence of either is fatal. To state a falsehood may by itself be entirely harmless, but when accompanied by an intent to deprive another of property, it constitutes the "intent to defraud." On the other hand, the mere intent to deprive another of property may be entirely legitimate, as where one requests a gift of money from another. The request definitely seeks to deprive the other of money, for if the request is granted the donor will part with—be deprived of—money. But when this request is accompanied by a falsehood the "intent to defraud" is complete, even though the donor parts with his money from motives of charity (Com. v. Whit-

comb, 107 Mass. 486; State v. Carter, 112 Iowa 15). It is therefore clear, that both sub-elements must co-exist to spell out the "intent to defraud."

Generally speaking, the falsehood used in the "intent to defraud" may assume any one or more of the multiform artifices conjured up by the ingenious mind of the cunning swindler. But the falsehood itself is but one of the sub-elements of defraudment; it is only the vehicle used in intending to deprive another of property, which together comprise the "intent to defraud." The statute in question affirmatively requires that there be an "intent to defraud," which necessarily includes all the sub-elements thereof, except (for constitutional reasons) it limits the falsehood to a false impersonation of a Federal officer. The practical effect thereof is that generally the "intent to defraud" consists of:

1. Any falsehood; and
2. an intention to deprive another of property;

whereas, by this statute, the "intent to defraud" is made to consist of:

1. A falsehood in the form of a false impersonation of a Federal officer; and
2. an intention to deprive another of property.

In all other respects, the words "intent to defraud" remain intact in the statute, with all its attributes, meaning and implications.

If it should be said that the "intent to defraud" consists in deceiving another by false impersonation, and nothing more, and that it means only an intentionally false impersonation as was said in Reed v. United States, 252 Fed. 21, 24 (C. C. A. 2), our answer is, that the other words of the statute, namely, "*falsely* assume or pretend to be an officer" (italics added), specifically address them-

selves to and embrace that feature of the offense. To falsely pretend is to pretend falsely; the pretension must be intentionally untrue and a falsehood. The purport of the word "falsely" in the statute is to circumscribe the offense to apply to intentional impostors only, for it is conceivable that one may impersonate a federal officer under an honestly mistaken belief that he is a federal officer. As for instance, where one has been duly nominated by the President of the United States for the office of Federal Judge and such nomination has received the requisite consent of the Senate, but before his commission is actually signed by the President (Marbury v. Madison, 1 Cranch 137, 156), he assumes his office as Federal Judge (under the mistaken belief that the Senatorial approval completes his appointment), acts as such and receives the salary thereof. Concededly, the statute would not operate on him, because in the supposed case the element of falsity in the impersonation was absent.

Reed v. United States, 252 Fed. 21 (C. C. A. 2), was a case where the defendants were charged with false impersonation with intent to defraud naval deserters, and the overt act was the arresting of such naval deserters. It appears that the arrest was made for the purpose of collecting the Government reward. It was not charged that the Government was to be defrauded out of the reward, but that the naval deserters were to be defrauded. Recognizing that "intent to defraud" was an element of the statute, l. c. 23, 24, but finding itself at a loss to explain how or of what the naval deserters were to be defrauded, Justice Manton, speaking for the Court, l. c. 24, illogically reasoned that:

> "The fraud was committed against the enlisted men, and consisted in telling these enlisted men of the Navy that Reed was a captain of the 'Navy' and Eaton a 'lieutenant' or other employe of the federal government."

If the "intent to defraud" merely consists of the falsehood that is inherent in every false impersonation, then it has no place in the statute and is pure surplusage. But we have demonstrated above that Courts must not lightly delete words from a penal statute. As a matter of simple definition and of elementary law, the words "fraud" and "defraud" mean the obtaining of property of another by a falsehood. The falsehood is not the intent to defraud; it is merely one of the elements thereof, the vehicle used to effect the defraudment. Shortly after the decision in the Reed Case, supra, Congress enacted a statute[36] specifically making false impersonation and arresting a person a misdemeanor. The decision in the Reed Case was clearly fallacious and has been totally ignored by all the Courts.[37]

The words "intent to defraud" or "defraud" as used in the statute in question, have never been squarely before our courts for definition or interpretation, and there is no reported case dealing squarely with this element of the offense. However, the dicta in Lamar v. United States, 241 U. S. 103; United States v. Barnow, 239 U. S. 74; Pierce v. United States, 314 U. S. 306, and the opinions of the various Circuit Courts of Appeals (except Reed v. United States, 252 Fed. 21) in cases involving the first clause of the statute assume, as a matter of law, that the words "intent to defraud" in the statute mean the intention to deprive another of money or property.

There is a plethora of state decisions defining the words "defraud" and "intent to defraud," all unanimously holding that they respectively, mean the deprivation or intention to deprive another of property by deceit. The Federal decisions define the word "defraud" as used in Federal criminal statutes, as meaning the causing of pecuniary or property loss by fraudulent means (United States v. Cohn,

[36] Act of Nov. 21, 1921, c. 134, Sec. 6, 42 Stat. 224, 18 U. S. C. 77, now 18 U. S. C. 77a.

[37] The Reed Case has never been cited or referred to in the reported cases.

270 U. S. 339, 346, 7; Hammerschmidt v. United States, 265 U. S. 182, 188; Curley v. United States, 130 F. 1, 9), but, as used in Title 18, U. S. Code, Sec. 88, it means the interference with or obstruction of one of the lawful governmental functions of the United States by deceitful means (United States v. Cohn, 270 U. S. 339, 346; Hammerschmidt v. United States, 265 U. S. 182, 188; Curley v. United States, 130 F. 1, 10). This latter or secondary meaning of the word "defraud" has application solely to conspiracies to defraud the United States (18 U. S. Code Sec. 88), because of the peculiarly broad language of that statute (United States v. Cohn, 270 U. S. 339, 346), which extends broadly to every conspiracy

> "to defraud the United States in any manner and for any purpose"

with no words of limitation whatsoever.

We must keep in mind that the indictment in the case at bar charges an intent to defraud Mrs. Silk—not the United States—and that the intent to defraud relates to a pecuniary or property loss sustained or sought to be sustained by Mrs. Silk.

In Curley v. United States (C. C. A.), 130 F. 1 (cert. den., 195 U. S. 628), the defendant was charged with the violation of Title 18 U. S. Code Sec. 88, for conspiring with another to defraud the United States by falsely impersonating his co-conspirator at a civil service examination. The defense was that the United States was not defrauded by defendant's act, and the case turned on the meaning of the word "defraud" as used in that particular statute. In affirming the conviction the Court, l. c. 6, said:

> "Quite likely the word 'defraud' as ordinarily used in the common law, and as used in English statutes and in the statutes of our states, enacted with the object of protecting property and property rights of

communities and individuals, as well as of municipal governments, which exist largely for the purpose of administering local financial affairs, has reference to frauds relating to money and property."

And again, on page 9, the Court said, what is particularly appropos to the case at bar:

> "The limited sense in which the word 'defraud' was sometimes used in the older statutes had reference to the protection of personal and individual property rights, as for instance, 'If any person shall defraud another,' etc. That kind of legislation results, of course, from the purpose of the local government to protect the individual in his natural and fundamental right to enjoy liberty and acquire property."

In principle, the foregoing quotation fits the statute involved in the case at bar. Nor is it altered by the fact that the statute also denounces attempts to defraud the United States; the charge laid is the attempt to defraud Mrs. Silk, a person, and not the United States.

In closing the opinion the Court, l. c. 12, said:

> "The purpose of the conspiracy here was • • • to secure the statutory pay intended by the government as compensation for an official answering the requirements and qualifications of the law; and in this sense surely the object of the conspiracy had reference to money and property of the government."

In Hammerschmidt v. United States, 265 U. S. 182, the defendants were charged with the violation of Title 18 U. S. Code Sec. 88, by conspiring to defraud the United States by impairing, obstructing and defeating a lawful function of the Government, by circulating handbills designed to advise and procure persons subject to the Selective Service Act to refuse to obey it. Demurrers to the indictment were overruled, and conviction followed. In reversing the trial court, this Court observed that the

handbills openly, frankly and boldly advised persons not to obey the Draft Act, and consequently the element of deceit in "defraud" was absent. The opinion then discussed the meaning of the word "defraud" in its primary and secondary sense, l. c. 188:

> "To conspire to defraud the United States means primarily to cheat the government out of property or money; but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention. It is true that the words 'to defraud' as used in some statutes, have been given a wide meaning—wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes."

It seems that in Horman v. United States, 116 Fed. 350, the words "scheme" and "defraud" in Title 18 U. S. Code Sec. 338 (using the mails to defraud statute), had been given a meaning that this Court felt was inharmonious with the law, and in addressing itself to the Horman Case, supra, Mr. Chief Justice Taft, speaking for this Court in the Hammerschmidt Case, l. c. 188, 189, said:

> "The decision, however, went to the verge, and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose."

In United States v. Cohn, 270 U. S. 339, the defendant was charged with violating Title 18 U. S. Code Sec. 80, in that with intent to defraud the United States he made

a false statement and claim to the U. S. Collector of Customs, and thereby obtained possession of a tax-free shipment of cigars. The cigars were shipped from the Philippines and was consigned to the defendant, but the bill of lading with a draft attached for the price of the cigars, was sent to a local bank with instructions not to deliver the bill of lading to defendant, except upon payment of the draft. Notwithstanding that he knew that the bank held the bill of lading subject to the payment of the draft, the defendant made a claim with the U S. Collector of Customs for the possession of the cigars, falsely stating that the bill of lading had not yet arrived, but would be delivered to the Collector upon its arrival. Relying on these representations the Collector turned over the cigars to the defendant.

The defendant contended that since these cigars were tax exempt the obtaining the cigars from the Collector, albeit by false claims and statements, did not operate to defraud the United States of any money or property. The District Court sustained a demurrer. The Government contended that the word "defraud" in the statute was used in its secondary sense, and did not relate to a pecuniary or property loss to the United States. In denying the Government's contention and affirming the action of the District Court this Court said, l. c. 345:

> "Under these Regulations, Cohn was not entitled to enter and obtain possession of the cigars until he had paid the draft and become the holder of the bill of lading. But even so, the acts by which possession of the cigars were obtained did not constitute an offense against the United States unless done * * * for the purpose of 'defrauding' the government."

In limiting the so-called secondary meaning of the word "defraud" to violations of Title 18 U. S. Code Sec. 88 only, this Court said, l. c. 346:

"Neither is the wrongful obtaining of possession of such non-dutiable merchandise a 'defrauding' of the government, within the meaning of the statute. It is contended by the United States that, by analogy to the decisions in Haas v. Henkel, 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 S. Ct. Rep. 249, 17 Ann. Cas. 1112, and Hammerschmidt v. United States, 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 S. Ct. Rep. 511, and other cases involving the construction of Sec. 37 of the Penal Code relating to conspiracies to defraud the United States, the word 'defrauding' in the present statute should be construed as being used not merely in its primary sense of cheating the government out of property or money, but also in the secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means. The language of the two statutes is, however, so essentially different as to destroy the weight of the supposed analogy. Section 37, by its specific terms, extends broadly to every conspiracy 'to defraud the United States in any manner and for any purpose' and with no words of limitations that can be implied from the context. Section 35, on the other hand, has no words extending the meaning of the word 'defrauding' beyond its usual and primary sense. On the contrary it is used in connection with the words 'cheating or swindling,' indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss."

This decision is the latest expression of this Court on the interpretation and meaning of the word "defraud" as used in Federal criminal statutes, and, by clear implication, the word "defraud", as used in Title 18, U. S. Code, Sec. 76, relates to pecuniary or property loss.

Nor is there any merit to the suggestion that a different rule should apply, because this statute appears in the chapter assigned to "Offenses Against Operations of Govern-

ment" in the U. S. Code. The re-arrangement of statutory provisions in the process of codification leaves their meaning unaffected. Hale v. Iowa State Board, 302 U. S. 95, 102. As was tersely said in Warner v. Goltra, 293 U. S. 159, 161:

> "The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread. 1-4 U. S. C., Sec. 2a, 44 Stat. at L., pt. 1, p. 1."

Neither is there any merit to appellant's suggestion that the word "defraud" ought to be construed so as to include a benefit to the accused, even if there be no consequent loss to the victim. But the statute is addressed not to whoever may benefit, but to whoever seeks "to defraud—a person," and the question is not whether the accused benefited, but rather, was the victim defrauded? And this is so, even if the accused has not gained, so long as the victim has been defrauded. See, Goldsmith v. Kopman, 140 Fed. 616, 621; United States v. Barnow, 239 U. S. 74, 80.

III.

The Oral Information Sought From Mrs. Silk, as to the Whereabouts of Abe Zaidman, Is Neither Money nor Property, and Consequently Is Not Subject to Defraudment.

Perhaps the clearest and most comprehensive definition of property is found in Ludlow-Saylor Wire Co. v. Wallbrinck, 275 Mo. 339, 205 S. W. 196, l. c. 198, as follows:

> "In law and in the broadest sense 'property' means 'a thing owned,' and is, therefore, applicable to whatever is the subject of legal ownership. It is divisible into different species of property, including physical things, such as lands, goods, money; intangible things, such as franchises, patent rights, copyrights, trade-

marks, trade-names, business good will, rights of action, etc. In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law."

It is important to determine whether or not the information as to the whereabouts of Abe Zaidman was a property or property right of Mrs. Silk. The information in question related to the existence of a fact—the fact of the whereabouts of Abe Zaidman. The place where Abe Zaidman resides is a matter of fact, and the information thereof would be a statement of fact. We contend that mere facts, news, information or intelligence, as such, is not the subject of private ownership or property, but is in the realm of public domain. As is said in 13 Corpus Juris (Copyright & Lit. Prop.), Sec. 21, p. 956:

"The facts and information themselves are not the subject of private property, and cannot be withdrawn from public use by reason of their collection and statement by any person."

In Davies v. Bowes, 209 F. 53 (D. C. N. Y.), the plaintiff brought an infringement suit, alleging that the defendant pirated the information contained in his copyrighted news item. A demurrer to the bill was sustained, on the ground that the copyrighted item purported to be a recital of news or facts, and that news or facts are public property, and plaintiff did not have a proprietary right or interest in the news or facts, as such.

In International News Service v. Associated Press, 248 U. S. 215, it was said that news or information, not the result of a literary, dramatic, musical or other artistic creation, is public or common property, and that no one individual has a property or property right in such news or information, as such. Mr. Justice Pitney, speaking for the Court, l. c. 234, said:

"In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it. • • • But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are public juris."

Mr. Justice Holmes, in a concurring opinion, l. c. 246, said:

"• • • there is no property in the combination or in the thoughts or facts that the words express."

Mr. Justice Brandeis, in explaining why there can be no property in news or information, as such, pointedly said, l. c. 250, 251:

"An essential element of individual property is the legal right to exclude others from enjoying it. • • • The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property."

Mr. Justice Brandeis reasoned that if there is no property in news or information, as such, there could be no unlawful taking thereof, l. c. 258:

"Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him."

The essential element of property, that of ownership and the lawful right to exclude others from enjoying one's property, is entirely wanting in the case at bar. Mrs. Silk may or may not have known Zaidman's whereabouts, but, in the very nature of things, there were others who

also knew it; his neighbors, his landlord, his friends and he himself necessarily had this information. However, none could claim ownership to this information, for its very nature was not subject to dominion or ownership, nor could anyone exclude others from learning it.

What we read, what we see, what we hear comprises the totality of our knowledge, yet our knowledge, per se, is not a property in the juridical sense. It may enable us to write books, compose melodious music, paint masterpieces, and produce other articles of property, but the information or knowledge, as such, is not a property.

Let us assume for the sake of argument that Mrs. Silk had actually furnished the defendants with the information sought; yet, neither in the legal sense nor in the economic sense, would the defendants have received any property, nor would Mrs. Silk have given up or lost any property. It is no solace to the Government that the defendants by the use of such information might induce Zaidman to pay his bill, and in that sense produce property by means of said information, for the law does not concern itself with remote possibilities. The charge laid against defendants in the indictment is not that the defendants might produce an item of property by the aid of the information, but that it—the information—the thing demanded of Mr. Silk, is, of and by itself, an item of property. We have demonstrated beyond cavil that the information sought from Mrs. Silk was not an item of property, even though it may be the means of producing property. If the information sought from Mrs. Silk was not property in the legal sense there could be no intention to deprive Mrs. Silk of property, and the element of the intent to defraud Mrs. Silk is absent.

Let us suppose that the defendants falsely posed as Federal officers and demanded of Mrs. Silk, not the whereabouts of Abe Zaidman, but information as to the correct time or the condition of the weather. The legal situa-

tion presented in the supposed case is not different from the case at bar, for both affirmatively lack the idea of defrauding Mrs. Silk out of an item of property. The most that can be said about the case at bar is that the defendants sought from Mrs. Silk an item that was neither property nor a subject of defraudment. For cases under the various state false pretense statutes, where the item sought to be defrauded was held not to be a property and not subject to defraudment, see State v. Towers, 122 Kan. 165 (extension of time to pay a matured debt); State v. Clay, 100 Mo. 571 (an invalid option of real estate and invalid power of attorney); State v. Martin (Mo. App.), 151 S. W. 504 (a credit entry on the books of his creditor); Robinson v. State, 53 N. J. L. 41 (signature to a voidable contract).

It would seem from a review of the decisions of the various state courts construing the false pretense statutes, that the only item or thing subject to defraudment is such property as may be the subject of larceny, and that mere personal benefits, conveniences, advantages or information that do not rise to the dignity of property, is not included.

Since the information in question was not the subject matter of property, it results that the defendants did not seek to defraud Mrs. Silk of any property, and an essential element of the "intent to defraud" is wanting.

IV.

The Overt Act Required by the Statute Relates to the "Intent to Defraud," and Must Be an Act Committed in Pursuance Thereof, and Sufficiently Associated Thereto, as to Convert the Fraudulent Intent Into a Fraudulent Attempt.

A crime consists of two major elements, the intention to do an unlawful act, and the actual doing of the act. The intent is the mere mental thought; the act is the overt con-

duct aimed at accomplishing this intention. The intent is the guiding lamp that directs the overt act. The offense is complete when the intent is converted into an attempt, i. e., when the overt act is done pursuant to the intent and is aimed at accomplishing it.

The statute in question was aimed at the swindlers and the extortionists and their nefarious practice of impersonating federal officers with the intent and purpose of cheating persons of their money and property. The statute operates alike upon the successful as well as the unsuccessful cheat. Congress used apt words to embrace the activities of the extortionist.[38] But the cunning and shrewd swindler does not stoop to extortion, he resorts to finesse. With a view to embrace the multiform artifices conjured up by the ingenious mind of the cunning swindler, Congress used the general words "and shall take upon himself to act as such."[39] The structure of the statute, presupposes the following natural sequence of events, first, an intent to defraud, second, a false impersonation of a Federal officer, and third, the commission of the overt act. All three must co-exist or no offense is committed.

Since the statute contemplates the existence of both the intent to defraud and the false impersonation before the overt act is committed, the words "shall take upon himself to act as such" necessarily relate to the subject matter preceding the overt act. This contemplates a person who intends to defraud another by means of the false impersonation. The office of an overt act is to transform the intent into an attempt. Since the only intent contemplated by the statute is an intent to defraud, it would seem that the overt act in the statute is addressed to transforming the intent to defraud into an attempt to defraud, of course, by means of the false impersonation.

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[38] ". . . demand or obtain from any person . . . ." Second clause of Sec. 32 of the Criminal Code (18 U. S. C. 76).

[39] First clause of Sec. 32 of the Criminal Code (18 U. S. C. 76).

The act must be committed in pursuance of and sufficiently associated to the fraudulent intent, but falling short of actual consummation of the defraudment, and possessing, except for the failure to consummate, all the elements of defraudment, so that, absent the failure to consummate, it would have resulted in actually obtaining the property of another by false impersonation.

To this general effect is Lamar v. United States, 241 U. S. 103, where this Court, in discussing the requisite overt act, said, l. c. 114:

> "• • • when rightly construed, the operation of the cl use is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person • • • and the doing in the falsely assumed character any overt act • • • to carry out the fraudulent intent."

And in United States v. Barnow, 239 U. S. 74, the Court said, l. c. 77:

> "But to take upon himself to act as such means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense."

We assume the Court had in mind an act done in keeping with the pretense to carry into execution the fraudulent intent. At any rate, the Court in the Lamar Case, supra, made it plain that the requisite overt act must be done to carry out the intent to defraud another. It would seem then, that an overt act not done to carry into execution the intent to defraud another, is not an overt act within the meaning of the statute.

V.

The Indictment Charging an Overt Act Must Recite the Facts Comprising the Overt Act.

The indictment in the case at bar did recite the facts from which the Government concluded that an overt act under the statute was committed, and we have no quarrel with the full recital of the particulars of that allegation. But appellant anticipated that we would contend, as we most certainly do contend, that the allegations charging the overt act affirmatively negatives an intent to defraud and therefore the indictment is not valid; and to combat this contention, the appellant in its brief seeks to press upon this Court the argument that a mere general statement in the indictment that the defendants took upon themselves to act as such pretended officers, without more, would satisfy the statute, and that, therefore, the actual recital of what such overt act consisted of is pure surplusage and should be now disregarded.

The applicable law on the subject of a factual recital of the essential elements in indictments is so clear that we would seem presumptious indeed, to argue this point at length, except for appellant's apparent seriousness. That the overt act is an essential element of the offense in the case at bar is unquestioned.

Relevant to this discussion is the appropriate remarks of Mr. Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, l. c. 558:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, it must descend to particulars."

The reports are replete with cases holding that the overt act must be factually described, so that the accused may be advised of the essential particulars of the charge against him, and enable the Court to determine whether the facts alleged constitute an overt act under the statute. See United States v. Cruikshank, 92 U. S. 542, 558.

The appellant cites Lamar v. United States, supra, and Pierce v. United States, supra, in support of their contention. A reading of those cases disclose that they are not authority for that proposition of law. In those cases, the Court merely summarized the indictments for the sake of brevity, and the context of the summaries would lend support to the view that the overt acts were fully and amply alleged.

VI.

Indictments Charging Fraudulent Conduct Must Recite the Facts That Comprise the Fraudulent Conduct and General Allegations Are Insufficient.

We raise this question as a prelude to the next point in this brief, that the words specifically charging the overt act is the only place in the indictment which described the thing Mrs. Silk was sought to be defrauded, and that such description was intended to serve, as indeed it does serve, two purposes in the indictment, namely, a recital of the facts comprising the overt act, and a description of the thing Mrs. Silk was sought to be defrauded.

We are mindful of the expressions appearing in the reports, to the effect that an intent may be generally alleged (Evans v. United States, 153 U. S. 584, 594), notwithstanding that the cases, including the Evans Case, supra, hold that general allegations of fraud in an indictment or in a bill of equity, without stating the factual particulars comprising the fraud, are insufficient. There is a clear distinction between the intent, i. e., the mental thought, and the

overt acts comprising the fraudulent conduct. The intent may be generally alleged, it is true, provided only that the fraudulent conduct, i. e., overt acts, are so particularized in the indictment, as to denote or signify the intent with which they were done. This is so because the thief does not shout his intentions from the house-tops; his criminal intention is his personal secret, and he conceals it safely in his breast. His intent, therefore, is virtually incapable of direct proof, and we are relegated to a scrutiny of his actions to determine circumstantially, whether or not such intent was present. But absent the requisite particularization of the fraudulent conduct, the general allegation of intent is mere color and insufficient. The rule is correctly stated in United States v. Hess, 124 U. S. 483, 487:

> "The doctrine invoked by the solicitor-general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute **may** be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

Fraud is a legal inference arising from certain stated facts, and is a mere conclusion of the legal effect of such stated facts. But what may appear to be a fraud to a prosecuting official may not be a fraud at law; and unless the conduct allegedly comprising the fraud is factually particularized in the indictment, the defendant will not be apprized of the specific charge against him, nor will the Court be able to determine, on demurrer, whether the facts stated constitutes a violation of the statute. Thus an innocent accused may be shuttled completely through the labyrinth of a trial before the Court can determine that the facts charged against him do not constitute a crime.

And so the fringe of our rights become frayed. This thought is aptly expressed in Rice v. Ames, 180 U. S. 371, 374:

> "A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion."

However else our Courts may treat general allegations of fraud in criminal indictments, they seem to be meticulous in requiring specific factual statements of fraud in civil pleadings. We know of no rule of law or of nature that suggests that property rights are to be treated more tenderly than natural rights.

In Alabama v. Burr, 115 U. S. 413, a demurrer to a declaration was sustained below, and, in affirming said action, this Court, l. c. 426, said:

> "Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad."

In Fogg v. Blair, 139 U. S. 118, a demurrer to a bill of equity was sustained, and, in affirming, this Court, l. c. 127, said:

> "As he impugned the good faith of the transactions between the company and the contractors, it was incumbent upon him to state the essential ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust,' a 'scheme' by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit."

In Chamberlain Machine Works v. United States, 270 U. S. 347, this Court, in affirming the sustention of a demurrer to a petition in a civil case, pointedly said, l. c. 349:

> "The general allegations of 'fraud' and 'coercion' were mere conclusions of the pleader; and were not admitted by the demurrer. Fogg v. Blair, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476. To show a cause of action it was necessary that the petition state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they were perpetrated with such definiteness and reasonable certainty that the Court might see that, if proved, they would warrant the setting aside of the settlement." (citing cases) "The petition contained no such specific allegations; and since its vague and general averments did not overcome the effect of the release, the demurrer was properly sustained."

And to the same effect is St. Louis, K. & S. E. R. Co. v. United States, 267 U. S. 346; Cairo, T. & S. R. Co. v. United States, 267 U. S. 350; Perkins-Campbell Co. v. United States, 264 U. S. 213; Dillon v. Barnard, 21 Wall. 430; Ritchie v. McMullen, 159 U. S. 235.

Cases in which demurrers were sustained because the pleading stated conclusions and not facts, seem to be more plentiful on the civil side than on the criminal side, and the judicial insistence on factual recitals seem to be more vehement in civil cases. Nevertheless, if such is the rule in civil cases, a fortiori, it is the rule in criminal cases. When we paraphrase the foregoing quotations to fit the criminal case, it results in the requirement that the indictment must particularize the facts which comprise the fraud or defraudment.

VII.

The Allegation Charging the Overt Act Serves Two Purposes in the Indictment, a Recital of the Facts Comprising the Overt Act, and a Description of That Which Mrs. Silk Was Sought to Be Defrauded. Since Information as to the Whereabouts of a Third Person Is Not Property, nor a Subject of Property, It Is Not a Subject of Defraudment. The Indictment, Therefore, Affirmatively Negatives an Intent to Defraud, and Does Not State an Offense.

The appellant's position seems to be that, inasmuch as the indictment merely charged the intent to defraud generally, without describing what the defendants sought to obtain from Mrs. Silk by the false impersonation, and the overt act, for aught that appears, they might have sought to defraud her of property. This might be so, if it were not for three distinct valid reasons.

Firstly, the general allegations of intent to defraud is no allegation of fact and raises no issuable fact, and if the indictment does not recite that the defendants sought to defraud Mrs. Silk of something, it would be consistent with their innocence and tantamount to a charge that they did not seek to defraud Mrs. Silk, and the indictment would fail.

Secondly, upon the authority of West Ohio Gas Co. v. Public Utilities Comm., 294 U. S. 63, 70, and United States v. California Co-op. Canneries, 279 U. S. 553, 555, this Court judicially notices that on page 2 of the Transcript of Record in this case, in the second count of the indictment, the defendants are charged alternatively to the charge in count one of the indictment,[40] with seeking to defraud Mrs. Silk of

[40] The indictment charges the same identical act in two separate counts, count one under the first clause of the statute, and count two under the second clause of the statute. There could be but one punish-

> "a valuable thing, to-wit, demand that she, the said Mrs. Adele Silk, then and there give to them, the said defendants, valuable information of and concerning the whereabouts of one Abe Zaidman" (R. 2).

That is the very same information that the defendants sought from Mrs. Silk in the first count. There being no other statement in count one of the indictment describing that which the defendants sought to defraud Mrs. Silk, and, aided as we are by the data disclosed by the second count, it would seem to result that the statement in count one of the indictment, namely, "information of and concerning Abe Zaidman," describes the thing which the defendants sought to defraud Mrs. Silk.

Thirdly, the statement in count one:

> "demanding of and from the said Mrs. Silk that she give the defendants information of and concerning the whereabouts of one, Abe Zaidman" (R. 2),

describes both the overt act and the thing which the defendants sought to defraud Mrs. Silk. We have demonstrated above that the overt act must be aimed at executing the intent to defraud, and this construction of the foregoing-quoted phrase from count one, is in consonance therewith. The effect of this allegation is, that the general allegation of intent to defraud is accordingly modified by the specific designation, so that the charge is, the false impersonation with intent to defraud Mrs. Silk of information of and concerning the whereabouts of Abe Zaidman, and the overt act is the demanding of such information from Mrs. Silk. This is in accord with the expression appearing in Dunbar v. United States, 156 U. S. 185, 190:

> "* * * the entire indictment is to be considered in determining whether the offense is fully stated."

ment for the same singular act though condemned by both clauses of the statute, because the same identical evidence that will establish a violation of the first clause will also establish a violation of the second clause of the statute. Burton v. United States, 202 U. S. 344, 381; Gavieres v. United States, 220 U. S. 338, 343; Ebeling v. Morgan, 237 U. S. 625, 631.

In that view of the matter, it would seem that, since the information sought from Mrs. Silk was not property, nor a subject of property, nor was it a subject of defraudment, the effect of the allegation was to negative the intent to defraud and render the indictment invalid. This principle is not new. It was very aptly stated in United States v. Corbett, 215 U. S. 233, l. c. 244, as follows:

> "It is, of course, to be conceded that where the facts charged to have been done with criminal intent are of such a nature that on the face of the indictment it must result as a matter of law that the criminal intent could not under any possible circumstances have existed, the charge of such intent, in general terms, would raise no issue of fact proper to go to a jury."

And such is the situation in the case at bar.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the construction placed upon Section 32 of the Criminal Code, as amended (18 U. S. C. 76), by the District Court, was correct; that the first count of the indictment fails to allege a violation of that statute; and that the judgment sustaining the joint demurrer to count one of the indictment be affirmed.

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